

UNITED STATES BANKRUPTCY COURT

DISTRICT OF SOUTH DAKOTA

ROOM 211

FEDERAL BUILDING AND U.S. POST OFFICE

225 SOUTH PIERRE STREET

PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

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December 2, 2002

Roger W. Damgaard, Esq.
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Sioux Falls, South Dakota 57102

John Harmelink, Esq.
P.O. Box 18
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Subject: ***In re Dennis L. and Mary Kay Ihnen***
Chapter 7; Bankr. No. 02-40459

Dear Messrs. Damgaard and Harmelink:

The matter before the Court is Cooperative Credit Company's ("CCC") Objections to Debtors' Claim of Exemptions. This is a core proceeding under 28 U.S.C. § 157(b)(2)(B). This letter decision and subsequent order shall constitute the Court's findings and conclusions under Fed.R.Bankr.P. 7052. As set forth below, the Court concludes that CCC's objections must be sustained in part and overruled in part.

Summary. On April 29, 2002, Dennis L. Ihnen and Mary Kay Ihnen ("Debtors") filed for relief under chapter 11 of the bankruptcy code. On June 26, 2002, CCC filed an objection to Debtors' claim of exemptions. On July 10, 2002, Debtors filed a response. At the September 10, 2002 hearing on CCC's objection, the parties agreed to submit the matter on stipulated facts and briefs. In their stipulation, filed on November 15, 2002 and incorporated herein by reference, the parties agreed the only legal issues remaining were:

- (1) whether both Debtors are entitled to claim a \$20,000.00 cash value life insurance exemption (as opposed to their only being able to claim a single \$20,000.00 cash value life insurance exemption); and
- (2) whether Debtors' annuity contract is properly exempt under South Dakota law (and if so, to what extent).¹

¹ Debtors and CCC also agreed that Debtors' homestead exemption was not valid as to CCC and that CCC's objection to Debtors' claim of exemption under S.D.C.L. § 43-45-4 should be denied.

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Discussion. A chapter 7 debtor may claim exempt "any property that is exempt under . . . State or local law that is applicable on the date of the filing of the petition." 11 U.S.C. § 522(b)(2)(A). In this case, the relevant "State or local law" is that of the State of South Dakota.

In determining the scope of an exemption under state law, the Court must look to state law. See *In re Sholdan*, 217 F.3d 1006, 1008 (8th Cir. 2000); *Hanson v. First National Bank in Brookings (In re Hanson)*, 848 F.2d 866, 868 (8th Cir. 1988). In the absence of any controlling state law, the Court must determine how it thinks the state's highest court would decide if presented with that issue. See *Jurrens v. Hartford Life Insurance Co.*, 190 F.3d 919, 922 (8th Cir. 1999). In making its determination, the Court "may consider relevant state precedent, analogous decisions, considered dicta, . . . and any other reliable data." *Lindsay Manufacturing Co. v. Hartford Accident & Indemnity Co.*, 118 F.3d 1263, 1268 (8th Cir. 1997) (quoting *Ventura v. Titan Sports, Inc.*, 65 F.3d 725, 729 (8th Cir. 1995), cert. denied, 516 U.S. 1174 (1996)).

Life Insurance. Under South Dakota law:

The proceeds of a policy of life or health insurance to the total amount of twenty thousand dollars only, in the absence of any agreement or assignment to the contrary, shall inure to the separate use of the insured, his surviving spouse or children, as the case may be, independently of the creditors of any of them and shall not be subject to the payment of the debts of any one or all of such persons, notwithstanding that the proceeds may be payable directly to the insured or surviving spouse or children as the named beneficiary, beneficiaries, or otherwise . . .

S.D.C.L. § 58-12-4.

The South Dakota Supreme Court does not appear to have addressed the question of whether married debtors may each claim exempt \$20,000.00 of proceeds from a life insurance policy. However, the plain language of § 58-12-4 provides that a total of \$20,000.00 of proceeds from a life insurance policy shall inure to the benefit of the insured, his spouse, or his children. Were the Court to permit Debtors to each claim a separate exemption, a total of \$38,754.27 would then inure to the benefit of Dennis Ihnen (the insured, per the parties' stipulation), his spouse, or his

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children.² For that reason, the Court believes the South Dakota Supreme Court would hold that Debtors may claim exempt only \$20,000.00 of the proceeds from their three life insurance policies. See *In re James*, 31 B.R. 67, 70 (Bankr. D.S.D. 1983).

Annuity contract. The parties stipulated that Debtors' annuity contract "was not in payment when the debtors filed their Chapter 11 petition and is not currently in payment." In its brief in support of its objection, CCC cites *In re Bowen*, 80 B.R. 1012, 1020 (Bankr. D.S.D. 1987), in support of the proposition that an annuity contract must be in "payment status" to be claimed exempt. However, *Bowen* involved a profit-sharing plan that the debtors were attempting to claim exempt as an annuity contract.³ That is not the situation in the instant case. There is nothing in the record to suggest that Debtors' annuity contract is anything other than an annuity contract.⁴

While the South Dakota Supreme Court appears to have been silent on this issue as well, nothing in the plain language of the statute suggests that an annuity contract must be in "payment status" to be claimed exempt. The Court finds no basis for imposing such a requirement. Debtors may therefore claim their annuity contract exempt.

Debtors' ability to claim their annuity contract exempt is not without limitation, however:

The total exemption under § 58-12-6 of benefits due and payable to any annuitant periodically or at stated times under all annuity contracts under which he is an annuitant, shall not at any time exceed two hundred fifty dollars per month for the length of time represented by such installments, and such periodic payments in excess

² The parties stipulated that the present value of Debtors' life insurance policies is \$38,754.27.

³ The *Scott* (*In re Scott*, Bankr. No. 385-00052, slip op. at 2 (Bankr. D.S.D. Feb. 10, 1986)) and *Voelker* (*In re Voelker*, Bankr. No. 482-00318, slip op. at 2 (Bankr. D.S.D. April 10, 1984)) cases cited by the Court in *Bowen* involved a profit-sharing plan and an individual retirement account, respectively, that the debtors were likewise attempting to claim exempt as annuity contracts.

⁴ To the contrary, the Allianz contract statement attached as Exhibit A to CCC's brief in support of its objection includes multiple references to "annuity," "annuitant," and "annuitization."

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of two hundred fifty dollars per month shall be subject to levy in the manner provided by law and the rules of court.

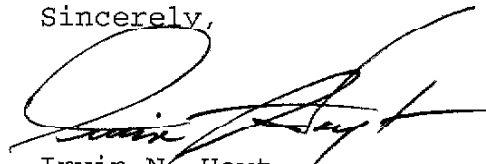
S.D.C.L. § 58-12-8.

The South Dakota Supreme Court does not appear to have addressed the question of how the Court should determine the extent to which a debtor's annuity payments may exceed the allowable exemption under § 58-12-8. However, the plain language of the statute suggests the Court must first identify "the payments due and payable on the petition date and the time periods over which those installments are to be paid, beginning with the date of the petition." *In re McGruder*, Bankr. No. 00-30094, slip op. at 14 (Bankr. D.S.D. August 14, 2001). Using that information, the Court must then "calculate a hypothetical monthly payment from which the exempt \$250 portion [must be] subtracted." *Id.* The difference, if any, may not be claimed exempt.

Nothing in the parties' stipulation provides any basis for the Court to make such a determination. While CCC has the burden of proving Debtors' exemptions are not properly claimed, Fed.R.Bankr.P. 4003(c), the Court is hesitant to dispose of the matter on that basis alone. The parties should be able to stipulate to the necessary facts. Having stipulated to those facts, the parties should then be able to determine whether under *McGruder* Debtors have in fact exceeded their allowed exemption. For that reason, the Court will give the parties additional time to confer. If the parties are unable to reach an agreement, CCC may request an evidentiary hearing on this issue alone.⁵ In the event CCC fails to request such an evidentiary hearing on or before December 20, 2002, the Court will enter an order overruling CCC's objection with respect to Debtors' annuity contract.

The Court will enter an appropriate order.

Sincerely,



Irvin N. Hoyt
Bankruptcy Judge

NOTICE OF ENTRY
Under F.R. Bankr.P. 9022(a)
Entered

I hereby certify that a copy of this document was electronically transmitted, mailed, hand delivered or faxed this date to the parties on the attached service list.

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U.S. Bankruptcy Court, District of South Dakota
cc: case file docket original; copies to parties in

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⁵ If CCC requests such an evidentiary hearing, Debtors are permitted to offer evidence regarding the matters specified in S.D.C.L. § 58-12-9.

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District of South Dakota

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